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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 476.

AMERICAN INSURANCE COMPANY ET AL.,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER (SUCCESSOR), SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL.,
RESPONDENTS.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

The Insurance Companies petition for a rehearing of the Order denying Certiorari for the following reasons:

I.

The importance of the question involved warrants granting Certiorari (*United Carbon Co. et al.* v. *Binney & Smith Co.*, decided December 7, 1942, and not yet reported).

II.

The summary proceeding employed by the Court involved procedure for which there is no precedent, and petitioners have been denied a hearing on the merits un-

der principles never heretofore determined by this, or any other, court.

III.

The circumstances were such that these petitioners could not have, and did not have, a fair and dispassionate consideration of their cases in the Circuit Court of Appeals, or the 3-Judge Court.

I.

This case involves important and novel questions which have not been, but should be, determined by this Court.

The situation presented by this proceeding is without parallel in the reported cases. Three years after these 137 cases had been settled, and final decrees entered, and more than $9,000,000 had been distributed (20% to policyholders and 80% to fire insurance companies) it was discovered that both the policyholders, the companies and the Court had been made the victims of an outrageous fraud.* The 139 fire insurance companies voluntarily, and at the first opportunity, announced to the Court their decision to return to the Court's custodian the more than $7,000,000 which they had received as the unwitting beneficiaries of this fraud and promptly complied with the order of the trial court that the funds be returned.

The 3-Judge Court entered a summary order in each case directing the companies to show cause why the money should not be distributed to the policyholders, and why the cases should not be dismissed (R. Vol. A. p. 251). This was a procedure unknown in the practice, but the

*The Insurance Companies had no reason to distrust Mr. Street who was admittedly "the foremost fire insurance personality in the western territory" (R. Vol. A. p. 365) and who represented that the money was desired for "legal Expenses" and "other Expenses of litigation," and would be accounted for, and whose reputation for honesty was nowhere questioned.

parties proceeded, filed answers in response to the orders to show cause (R. Vol. A. p. 252), and voluminous evidence was taken.

The Companies contend that the original orders of dismissal (Entered February 1st, 1936) must be deemed to have been set aside, and that if the Court had the right to deal with the fund at all, it could deal with it only on that basis. It seems to be the view of the Circuit Court of Appeals that the Companies should in any event have filed a Bill of Review, or other independent proceeding (R. Vol. V p. 24).

Widely divergent views appear as to the character of the pleadings filed by the Companies, and as to the effect of the Court's "show cause" order, particularly as to whether the Companies have properly asked for the right to try their cases on the merits.

It is submitted that the Companies, confronted by a situation for which no direct precedent is found in the books, should have the benefit of a determination by this Court of their rights. This is further accentuated by the following considerations:

(1) The Circuit Court of Appeals held that because of the "*implied knowledge*" of the Companies (the existence of which both in law and fact the Companies vigorously denied) the clean hands doctrine was applicable, notwithstanding failure to show any moral turpitude on the part of the Companies or their officers, or conscious wrongdoing, a novel doctrine never before known to have been promulgated by any Court.

(2) Aside from any consideration of the amount involved (more than $8,000,000) the importance of this question, and the imputation of fraud, as applied to corporations generally, and to these 139 Companies, which include all the largest fire insurance companies in the United States, should warrant the Court in granting Certiorari and reviewing the decision.

(3) The issues in the original suits (aside from the amount of money involved) present important questions of law as to fire insurance rate making which have never been, but should be, decided by this Court (See Point V *infra*).

II.

Petitioners respectfully submit that they did not have a fair and dispassionate consideration of their cases in either of the two courts.

The opinions in both courts show on their face evidence of indignation and resentment which made it impossible for the judges of these courts to give calm and dispassionate consideration to these cases.

The Opinion on motion for new trial concedes that the first Opinion written by the 3-Judge Court contains many inaccuracies (R. Vol. A, p. 432). And while the Opinion on Motion for New Trial holds that these inaccuracies were not material, it must, we think, be conceded that they definitely indicate an unusual state of mind on the part of the able and distinguished members of the Court.

In the Opinion on Motion for New Trial, while any intention to punish the Companies because of Street's acts was disavowed by the Court, nevertheless, it is repeatedly stated (at least eight times) that the proceeding was for the purpose of *vindicating the integrity of the Court* (R. Vol. A, pp. 435, 436, 441, 442, 483) which was wholly unnecessary and really implies punishment, and which is utterly foreign to the function of the equitable maxim that he who comes into equity must come with clean hands. In an opinion written by one of the members of the 3-Judge Court in a related proceeding the acts of Pendergast-O'Malley-Street were characterized as "exposing its judges to the possibility of disgrace and certain humiliation." *U. S.* v. *Pendergast*, 39 F. Supp. 189, 190.

The case came to the Court of Appeals surrounded with the same atmosphere, and in disposing of the appeal that Court (1) applied, we contend, an entirely unjustified and arbitrary construction of its rules as warranting it in disregarding appellants' "Points Relied Upon for Reversal," (2) criticised appellants for filing in the Circuit Court of Appeals certain pamphlets and briefs which were filed pursuant to the order of the 3-Judge Court (R. Vol. A, pp. 432, 18)* (3) without basis in the findings of the 3-Judge Court and (as petitioners contend), without the slightest supporting evidence, held the petitioners to have been participants in the Pendergast-O'Malley-Street fraud, and (4) held that Petitioners had abandoned Points to be relied upon (9), (10) and (11) by failing to discuss them in their brief. The Court said (R. Vol. 5, p. 19):

> "While Appellants set out 11 Points as being relied upon by them for reversal, they in fact, in their brief discuss only the first 8 of these Points.

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*In its Opinion the Circuit Court of Appeals states:

> "It is difficult to determine just what questions are intended to be presented, and the merits or demerits of such questions have been obscured by an avalanche of redundant, irrelevant and immaterial matter, among which is a pamphlet designated 'Parallel Column Comment' (above referred to); a similar pamphlet designated 'Outline of Mr. Bullitt's Oral Argument' (submitted in the lower court); a 33-page printed brief submitted to the lower court in these causes; a 113-page brief entitled in the same suit, designated 'Brief for the Fire Insurance Companies'; a 53-page brief entitled in the same case, designated 'Suggestions of Plaintiff Insurance Companies in Support of Their Motions for New Trial'; a 6-page brief entitled in the same suit, designated 'Insurance Companies' Reply to Memorandum for Defendant Lucas'; a 13-page brief entitled in the same suit, designated 'Plaintiffs' Reply to Counter Suggestions of Defendant Lucas, Superintendent' ".

This criticism is unwarranted. In the Opinion on Motion for New Trial, the 3-Judge Court ordered transmittal of most of these items in the following language:

> "Therefore, two things are necessary: (1) that all of the separate matters to which this opinion makes page ref-

Points (9), (10) and (11) are therefore abandoned *and will be given no further consideration"* (Emphasis ours).

These were important points. They are:

(9) The Court erred in holding that the "unclean hands" rule applied where the alleged misconduct (a) did not inhere in, or infect, the cause of action which the 139 companies were seeking to enforce, and (b) had no relation to the equity for which those Companies were suing.

(10) The Court erred in holding that the $8,132,223.51 (with interest thereon) should be returned to the policyholders, without first deciding the causes of action alleged in the 139 companies' original and Amended Bills of Complaint, and the right to the injunctions (interlocutory and permanent) therein prayed for and rendering a Decree upon the merits of the controversy so alleged between the 139 companies and the defendants (Superintendent of Insurance and Attorney General of Missouri).

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erences should, in some form, be taken to the reviewing Court; and (2) that the present paging be preserved therein.

Such matters are: (1) Transcript of Oral Argument (on May 29, 1939, on issuance of restoration and show cause orders), (2) Memorandum for Insurance Companies (filed June 24, 1939), (3) Record of evidence taken before the Special Master, (4) Report of Master, (5) Brief for Fire Insurance Companies (on merits), (6) Transcript of Oral Argument at hearing on May 20, 1940 (on merits), (7) Motion for New Trial, (8) Suggestions of Plaintiff Insurance Companies in Support of their Motions for New Trial."

In the order consolidating the cases for hearing, the 3-Judge Court ordered 7 copies of the following briefs and printed arguments to be transmitted to the Clerk of the Circuit Court of Appeals:

"Outline of Mr. Bullitt's oral argument (on motion for new trial) consisting of a reprint of the court's opinion with parallel column comments thereon;

Insurance companies' reply to Memorandum for Defendant Lucas;

Plaintiff's reply to counter suggestions of Defendant Lucas, Superintendent."

(11) The Court erred in refusing to grant each of the 139 Companies the right to a decision on the merits, and in denying interlocutory injunctions and permanent injunctions as prayed in the original and Amended Bills of Complaint.

and with the exception of the last clause in Point (11), they were discussed in the brief.

They were discussed, and necessarily discussed, throughout the brief on the law, because all of the discussion led up to the proposition asserted in the original returns of the petitioners to the show cause order that the Court could not dispose of the impounded funds without determining who owned them by an adjudication of the merits in petitioners' original suits. This question laid at the very threshold of the case (See *U. S.* v. *Bernays*, C. C. A. 8th, 158 Fed. 792; *Andrews* v. *Nat. Foundry Company*, C. C. A. 7th, 77 Fed. 774, cert. denied 166 U. S. 721).

To show that they were specifically discussed, we attach hereto planograph reproductions of Point (7) in the "Summary of Points Discussed," and Point (7) of the Brief.

Petitioners contend that in both Courts the Judges were unconsciously influenced by their abhorrence to occurrences of this kind in connection with litigation pending before them, so that petitioners did not receive the dispassionate consideration of their case to which they were entitled.

Petitioners respectfully urge that the principles of natural justice require this Court to take the Record and consider it fully and calmly, far removed from the scene of these occurrences.

We particularly call the attention of the Court to the fact that counsel for the Superintendent of Insurance conducted an exhaustive investigation in the taking of evidence, during the progress of which he called to the stand executives of the 139 Companies involved, and that as a result of prolonged hearings involving the taking of more

than 1900 pages of testimony and after the master made a careful review of the evidence, embodied by him in a Report of 679 pages, he concluded that the witnesses, [all of whom testified that they had no knowledge or suspicion of fraud] were credible, and so stated in his Report (R. Vol. IV, p. 5). After two exhaustive hearings, and two oral arguments and consideration of two sets of Briefs (on original hearing and on motion for new trial) *the 3-Judge Court found no evidence of fraud or personal guilt on the part of the executives of any Company (except Street himself).* Upon the fullest consideration, it was only by a finding of "implied knowledge" that the 3-Judge Court was able to find any basis for denying these petitioners the right to be heard on the merits of their actions.*

The Court of Appeals in its Opinion, without the recitation of any evidence, and without in any way justifying its action, for the first time, placed the stigma of "participation" in the fraud upon these Companies. The gravity of this charge, the importance of the issues of law and fact and the magnitude of the interests which are thus placed under a blanket imputation of this character, should, we respectfully submit, warrant this Court in taking the Record and subjecting it to the closest scrutiny. This is particularly true in view of the apparent difference of opinion between the CCA and the 3-Judge Court upon this question.

III.

Appellants' "points relied upon for reversal" are directed against the findings of fact and conclusions of law.

While the opinion of the Circuit Court of Appeals contains a rather perfunctory reference to the merits of

*79 of these Companies did not know that any settlement was proposed or made until after the settlement had been consummated. This is shown by the evidence and conceded in the opinion of the 3-Judge Court (R. Vol. A., p. 482).

the case, this is preceded by an extended discussion of Appellants' "Points," and a determination that these Points are either insufficient or abandoned.

In effect, we submit that the case has been determined primarily, [and incorrectly determined] upon a technicality so narrow that it should challenge the attention of this court and should be corrected. It is held that these "Points" are directed against the trial Court's opinion and not against its finding. This, we say is incorrect.

In stating its "Points relied upon for Reversal," the Appellants practically adopted (and directly challenged) the language of the Findings of Fact and Conclusions of Law made by the 3-Judge Court. Points (1) and (2) (R. Vol. 5, p. 8) are practically quotations from, and assignments of error in, Findings of Fact No. IX (R. Vol. A. p. 409) and Conclusions of Law "D" (R. Vol. A., p. 410).

Finding of Fact IX is as follows:

> "This plaintiff had knowledge of facts which would have *put a reasonably prudent person upon inquiry* as to the way in which Street was exercising his power as such agent; and, *had reasonably diligent inquiry been made* by plaintiff, *it would have discovered that Street was using improper means to secure such agreement*" (Vol. A, p. 409).

and Conclusion of Law D is as follows:

> "Under the evidence in this record and the facts as found, each and all of the companies before this Court *had knowledge of facts concerning the conduct of Street which would have put a reasonably prudent person on inquiry and, had such inquiry been pursued with reasonable diligence, the fraud upon this Court would have been prevented*" (Vol. A, p. 410).

"Points Relied Upon for Reversal" (1) and (2) in Appellant's Brief, page 44, are as follows:

> "The Court erred in holding that the Six Companies, the 60 Companies, and the 13 Companies (or

any of them) *had knowledge of any fact concerning Street's conduct, which (no matter how diligently such inquiry might have been pursued) could possibly have prevented such fraud upon the Court.*

"The Court erred in holding that *the knowledge* of the 29 New York Companies and of the 26 Hartford Companies *of certain facts concerning Street's conduct was such as would have put a 'reasonably prudent person on inquiry'; and that (a) had such inquiry been pursued with reasonable diligence would have prevented the fraud upon the Court; and (b) those Companies would have discovered that Street was using improper means to secure the Settlement Agreement.*"

Without encumbering this motion with further quotations, we desire to point out that "Points" (3) and (4) (R. Vol. 5, p. 9) likewise directly challenge Finding of Fact No. IX as to the knowledge possessed by Appellants, and Conclusions of Law "B" and "D" which relate to "imputed," "implied," or "constructive" knowledge.

Points (5) and (6) (R. Vol. 5, p. 9-10) are couched in language which is practically identical with Finding of Fact VIII (Vol. A, p. 409), and is unmistakably directed against that Finding.

Points (7), (8) and (9) (R. Vol. 5, p. 10-11) are directed against Conclusions of Law "B," "C" and "D" (R. Vol. A., p. 410).

There is not a word nor a suggestion in any of these "Points" that they are directed against the Opinion of the Court. The Circuit Court of Appeals was of opinion that a charge of error in "the holding" of the court referred to the opinion of the trial court. There is no such fine spun distinction between the use of the words "holding" and "finding."

These are not assignments of error of the kind that were considered in the cases cited in the Opinion of the Circuit Court of Appeals, in which the error assigned either expressly referred to the Opinion or was unmistakably so intended.

Thus, in *E. R. Squibb & Sons* v. *Mallinckrodt Chemical Works*, 69 F. 2d 685, the assignments of error, which were held insufficient, repeatedly asserted that the Court erred "in holding in its Opinion" the various matters complained of.

In *Jones* v. *Futrall*, 75 F. 2d 418, the record was such that the Finding itself could not be challenged, and therefore the assignments of error were held obviously to refer to reasons given in the opinion. Other cases cited are equally distinguishable.

The Circuit Court of Appeals holds that an assignment that the court erred in "holding" is not a charge of error in a "finding." This is a mere play on words and amounts to a denial of justice. As used in these "Points" the word "holding" is synonymous with "finding." There was only one point in the case, namely, whether the companies were entitled to have their rights in the impounded funds determined by a trial of their cases on the merits.

Emphasis is laid upon the fact that Appellants in their brief repeatedly referred to the two Opinions rendered in the District Court. It is a novel and unsound doctrine to hold that an assignment of error or "Point" necessarily was directed against the Opinion because the Brief discusses and criticizes the Opinion. It is a denial of justice to hold that "Points Relied Upon" are to be interpreted as referring to the Opinion because the brief itself discusses the Opinion.

IV.

Petitioners have a right to assert their claims to the impounded funds through a determination of the actions on the merits.

There is an important question decided by the CCA which, while it is implicit in the first reason urged by petitioners for the allowance of the writ, was not clearly presented. The CCA held that because petitioners had

not moved to reinstate their original suits nor filed bills for review, they were not in a position to assert claims to the impounded funds. This conclusion of the CCA is based entirely upon false premises and entirely ignores the Order to Show Cause made by the 3-Judge Court and the returns of petitioners thereto. The Order to Show Cause of necessity implied that the dismissals contained in the decrees of February 1 had been vacated, first, because the Court would have been without power to enter an order in a case unless that case was pending (*Mason* v. *Kansas City Belt Railway Co.*, 226 Mo. 212, 223, 224), and, second, because in the show cause orders the Court commanded the petitioners to show cause why the cases should not be dismissed and the impounded funds restored to the policyholders. If the cases when those orders were entered stood dismissed, it would have been absurd for the 3-Judge Court to order the petitioners to show cause why they should not be dismissed.

These proceedings were novel and without precedent in the books. They were initiated by the show cause orders of the 3-Judge Court entered in each case more than three years after entry of the final decree. The pleadings consisted of the show cause orders and the returns of the respondents thereto. In their returns the petitioners, as they had a perfect right to do and as they were led into doing, by the show cause orders, assumed that the dismissals had been vacated and they alleged that to dismiss their cases without an adjudication of the ownership of the impounded funds upon the merits of their suits would be unlawful and inequitable.

They said:

> "The Court may make distribution of the sums in its possession only according to law, to the lawful owners of said money as may be determined upon an appropriate hearing and determination of the merits of the controversy as set out in the pleadings of the respective parties, and pursuant to the evidence and

the Master's Report and Exceptions thereto" (R. Vol. A. p. 256).

They said further:

> "This Court is without power and ought not in law or equity dismiss this suit except only upon affirmation of the settlement if validity thereof be asserted by the defendants and they adhere thereto, or after a hearing upon the merits of the controversy and the determination of the court if it should upon due hearing so determine that the said bill ought to be dismissed for failure of the plaintiff to establish its case or otherwise according to the due process of the law, but that to dismiss the said cause at the cost of the plaintiff pursuant to the order to show cause is and would be an unlawful and inequitable action, and such action if by the Court taken is violative of the due process of law to which the plaintiff is entitled by the provisions of the first section of the 14th amendment of the Constitution of the United States" (R. Vol. A. p. 256).

In their prayers to the show cause orders petitioners prayed "(a) and that the defendant show cause, if any there be, why the Court should not proceed with the determination of the merits of the controversy between plaintiff and defendant as in their pleadings set forth" (R. Vol. A, p. 258).

Indeed, it is conceded by the respondents in their Brief in Opposition to the Granting of the Writ of Certiorari that the dismissals were reopened, *i. e.*, vacated, "for the purpose of ordering re-distribution" of the impounded funds. It is said in that brief (p. 24), "the bribery of the Superintendent constituted extrinsic fraud which would permit re-opening of decrees of dismissal after the term for purpose of ordering redistribution of the amount of rate increase, which had been impounded during litigation." So, not only did the petitioners assert claims to the impounded funds, but they were in a position to assert such claims.

We do not mean, as the respondent seems to think (p. 22 of his Brief), that the ownership of the impounded

funds could be determined in these proceedings. The only proceedings in which it can be determined whether or not the 16 2/3% increase was reasonable, and whether or not the order of the Superintendent of Insurance disapproving that increase was confiscatory, are petitioners' original cases. We contend and assert that the Court, having taken the impounded funds into its possession pursuant to the interlocutory injunctions in those original cases, had a self-imposed duty to determine who owned those funds (*U. S.* v. *Morgan,* 307 U. S. 183) and that the decision of the CCA, without determining whether or not petitioners had any interest in the impounded funds, ordered this very large sum of money paid to the policyholders arbitrarily and without any regard to the rights of petitioners, and thereby failed to perform this duty. In so doing the CCA's opinion is in conflict with *U. S.* v. *Morgan.*

In this regard there is no distinction between this case and *U. S.* v. *Morgan.* In that case the secretary made an order reducing rates to be charged by the market agencies at the stockyards in Kansas City, Missouri, for their services. The market agencies filed Bills in Equity in the Federal Court at Kansas City in which they claimed that the secretary in making his order had not accorded them due process and in which they claimed that the rates fixed by the secretary's order were confiscatory. For each and both reasons, they claimed in their bills that the secretary's order was void. The 3-Judge District Court, after hearing, held that the order was not violative of due process and that the rates fixed by the secretary were reasonable and not confiscatory and dismissed the bills. The market agencies appealed to this Court. This Court held that the market agencies had been denied due process by the secretary (*Morgan* v. *U. S.*, 304 U. S. 773) and remanded the case to the District Court. In the meantime, new rates had been put in force by agreement between the secretary and the market agencies and the interlocutory injunctions and the consequent

impounding of the difference between the old rates and the rates fixed by the secretary's order ceased and terminated. The secretary filed a motion in the District Court to stay the distribution of the impounded funds until he could make a new order. This Court having held that the secretary's order was void, the District Court ordered the impounded funds distributed to the market agencies. The secretary appealed to this Court and this Court held that having taken the fund into its possession under the interlocutory injunctions the District Court as a Court of Equity had a self-imposed duty to determine who owned the fund in accordance with law and justice. This was the chief question in the case. In so far as the Court dealt with the power of the secretary to make a new order fixing rates as of the date of the original order, the Court was dealing with the quality of the proof of the chief question, the ownership of the impounded funds. *U. S.* v. *Morgan*, 313 U. S. 409, 426 (dissenting opinion of Mr. Justice Roberts).

We earnestly urge this as a ground for rehearing for three reasons: *First*, because of the nature of the procedure in this case [a show cause order entered without hearing more than 3 years after final decree and returns thereto by the petitioners] is wholly without precedent; *Second*, because the Circuit Court of Appeals placed an unjustifiable interpretation upon these novel pleadings, and, *Third*, because, while the point is implicit in the first reason for the allowance of the writ set forth in our petition for certiorari, it was not clearly presented.

V.

The question of confiscation as applied to a fire insurance rate controversy involves important questions of law which have not been decided by the Supreme Court of Missouri, or by this Court, but which should be decided.

The sole issue involved in the merits of the rate controversy is whether or not prior rates were confiscatory.

The Bills of Complaint in each of the 137 cases directly present this question.

The making of fire insurance rates involves principles which are different from those involved in public utilities, and in rate making generally. No case has ever been decided by the Supreme Court of Missouri, or (so far as we are aware) by the Supreme Court of the United States, in which the issue of confiscation as applied to the process of rate making in the fire insurance field has been determined.

These cases are all fully tried and *ready for determination on the merits.* In every case the evidence has been taken and transcribed and the report of the Master filed. Five representative cases have been briefed, and were under submission for a period of more than a year before this settlement was made.

For 20 years the fire insurance companies have endeavored to get the issue of confiscation, and applicable principles, determined.

A statutory review action involving this identical 16 2/3% rate increase was filed jointly by 74 companies in the Missouri state court at the same time these 137 cases were instituted. This action was determined against the companies solely on the technical ground that the court was without jurisdiction. *American Constitution Fire Ins. Co.* v. *O'Malley,* 342 Mo. 139.

An earlier case [1926] involved a rate reduction order, which was decided in *Aetna Ins. Co.* v. *Hyde,* 315 Mo. 113, upon the issue of aggregate experience. On appeal to this court it was held in *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440, that no issue as to individual confiscation had been properly raised.

Suits based on individual experience were immediately thereafter instituted and relief denied (as to most of the companies) on the ground of estoppel. *Aetna Ins. Co.* v. *Hyde,* 34 F. 2d 185, affirmed *sub. nom. National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331.

Thus, neither the Missouri Supreme Court, nor this Court, have ever decided the issues relating to confiscation as applied to fire insurance rates. The issue is one of great importance and would be determined upon a trial of the merits which petitioners are now seeking.

We respectfully submit that for all of the foregoing reasons the Court should grant a rehearing of the order denying petitioners writs of Certiorari, and that writs of certiorari be granted to petitioners as prayed.

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